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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Dear Mr. Caton:

On behalf of Capital Cities/ABC, Inc., transmitted herewith for filing with the Commission are an original and five copies of its Comments in MM Docket No. 93-254.

If there are any questions in connection with the foregoing, please contact the undersigned.

Sincerely,

Kristin C. Gerlach

KCG/ak
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	MM Docket No. 93-254
Limitations on Commercial Time	)	
on Television Broadcast Stations	)	

COMMENTS OF CAPITAL CITIES/ABC, INC.

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December 20, 1993

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Summary

The Commission initiated this Inquiry to seek comment on whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations. We firmly believe the Commission should refrain from establishing any such restrictions. Limitations on commercial matter are unnecessary and inadvisable and would raise substantial First Amendment concerns.

Limits on commercialization are in no sense necessary to protect the public interest. Because today's viewing audiences expect to see more commercial matter than they did in past years, and because they have so many programming choices available to them, it is difficult to imagine a compelling Commission interest in protecting the public from "overcommercialization." The level of commercialization is effectively controlled through the operation of the competitive marketplace, including viewer options to turn to other video alternatives. As then-Chairman Quello noted, "[t]he tyranny of the remote control provides an adequate check on broadcast stations that must increasingly compete for viewers."

Imposing commercialization limits would also handicap broadcast television in its efforts to compete effectively in today's video marketplace. Television broadcasters must have the freedom to establish commercial practices that best suit the competitive conditions in which they operate. Imposing an artificial limit on the amount of commercial matter would do nothing but place broadcasters at a serious disadvantage vis-a-vis their nonbroadcast competitors.

In addition, commercial restrictions would raise substantial First Amendment concerns. The protection for commercial speech permits government regulation only when it is narrowly tailored to strike at real and ascertainable abuses. In today's diversified marketplace, viewer preferences can operate effectively to limit levels of commercialization. In these circumstances, it is hard to imagine a government interest that would rise to the level of substantiality constitutionally sufficient to justify regulation.

Before the
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Washington, DC 20554

In the Matter of	)	
	)	MM Docket No. 93-254
Limitations on Commercial Time on Television Broadcast Stations	)	

To: The Commission

COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC") submits herewith its Comments in response to the Notice of Inquiry in the above-entitled proceeding ("Notice").[1]

Introduction

Capital Cities/ABC, Inc. ("Capital Cities/ABC") is a diversified media company that operates the ABC Television Network and owns eight television broadcast stations. Our interests will be directly affected by the outcome of this proceeding.

This Inquiry was initiated by the Commission to evaluate the "commercial programming practices" of television broadcast stations. Specifically, the Notice was issued to seek comment on whether the public interest would be served

[1] MM Docket No. 93-254, Notice of Inquiry, FCC 93-459 (rel. October 7, 1993).

by establishing limits on the amount of commercial matter broadcast by television stations. We believe that the answer is a firm "no." Limitations on commercial matter are unnecessary and inadvisable and would raise substantial First Amendment concerns.[2]

The Commission eliminated its quantitative commercial guideline for television broadcast stations in 1984. That decision was based on three fundamental principles: that the marketplace would control the amount of commercialization in broadcast programming; that to keep the guidelines in place would handicap broadcast television in its efforts to compete effectively and flexibly with future video entrants; and that the guideline might exert a chilling effect on commercial speech inconsistent with the First Amendment.[3]

The Commission's rationale was correct in 1984, and carries even more force today. As a recent Commission study demonstrated, over-the-air broadcasting is already severely

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[2] This Inquiry appears to have been prompted by concerns related to television broadcast stations that have adopted home shopping formats, that is, stations that are "predominantly utilized for the transmission of sales presentations or program length commercials." However, the Notice is broad in scope and also addresses commercialization on television broadcast stations in general regardless of format. Our comments focus on this broader issue.

[3] It also cited the obvious administrative burden on the Commission and the compliance burden on broadcast licensees. Report and Order in MM Docket No. 83-670 (Television Deregulation), 98 FCC 2d 1076, 56 Rad. Reg. 2d (P&F) 1005 (1984) ("Deregulation Order"), recon. denied, 104 FCC 2d 357, 60 Rad. Reg. 2d (P&F) 526 (1986), aff'd in part and remanded in part sub. nom Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

hampered through irrevocable audience loss to other video market participants.[4] Television network companies and local broadcasters must finance their programming virtually exclusively from the revenue generated by advertising. Any restrictions on commercial matter that resulted in decreased revenue could ultimately damage the quality and diversity of programs broadcasters offer including news and children's programs that clearly serve the public interest. The ability of broadcasters to compete with market participants unhampered by these restrictions would suffer as well. Commercial limits could also discourage investment in broadcast properties. In short, a limit on commercial matter would not serve the objective of protecting the public interest in free, over-the-air broadcasting.

In addition, commercial restrictions, whether in the form of "guidelines" or rules, would raise substantial First Amendment concerns. The protection for commercial speech permits government regulation only when it is narrowly tailored to strike at real and ascertainable abuses. The First Amendment disfavors blanket restrictions on broad classes of speech. While we recognize that at this point the Commission is making no proposal but is merely soliciting comments, we believe it is timely to emphasize the heavy

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[4] Office of Plans and Policy Working Paper #26. Broadcast Television in a Multichannel Marketplace, DA 91-817, 6 FCC Rcd 3996 (1991) ("OPP Paper").

burden of justification that must be met to warrant regulation.

I. THE BASES SUPPORTING ELIMINATION OF COMMERCIAL LIMITATION GUIDELINES ARE STILL VALID.

As it noted in its 1984 Deregulation Order, the Commission's prior policies with respect to commercial practices were based on the perceived need to prevent the possible abuse of scarce broadcast resources through "excessive commercialization." In that Order, the Commission wisely decided to eliminate its commercial guidelines, including its policy banning program length commercials, opting instead to rely on market forces to monitor levels of commercial matter. The bases underlying the 1984 Deregulation Order are, if anything, more well-founded in today's competitive video environment.

A. Marketplace Forces

The 1984 Commission reasoned that the level of commercialization would be effectively controlled through the operation of the competitive marketplace, including viewers' options to turn to other video alternatives. That conclusion applies with even more force today. In the decade since that decision, the number of video alternatives has increased tremendously.[5] More than ever before, today's viewers have

[5] See, generally, OPP Paper.

the power to decide what television broadcast programs succeed or fail -- if they don't like them, they won't watch them, and there is no audience to sell to advertisers. Unlike the marketplace of 1960 when the Commission articulated its general policy against "over commercialization" and there were few viable alternatives, there is today an enormous array of choice for the television audience.[6]

Then-Chairman Quello recently reinforced the notion of the public interest standard as not only flexible, but "expressly forward-looking":

> ...[w]hile the overall [public interest] requirement is a constant, its meaning changes over time to account for the evolution of the mass media, consumer needs and audience expectations.[7]

In particular, he noted that "the notion of what may be considered `excessive' advertising has changed over time."[8] He maintained that viewing audiences today expect to see more commercial matter than they did in past years and have readily available alternatives should the amount of commercialization become excessive. Referring to these alternatives, he stated that "[t]he tyranny of the remote control provides an adequate

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[6] See also Separate Statement of Chairman James H. Quello in this proceeding at p. 4: "[I]n 1928, [the Federal Radio Commission] expressly rejected the argument that listeners could shift away from 'irksome broadcasts' ... not[ing] that the listeners' 'only alternative, which is not to tune in on the station, is not satisfactory...'" Today, of course, there are numerous alternatives for viewers tuning away from "irksome broadcasts."

[7] Id. at p. 3.

[8] Id. at p. 4.

check on broadcast stations that must increasingly compete for viewers." Given those considerations, Chairman Quello concluded that "the Commission's interest in preventing overcommercialization is far different today than we may have considered necessary in the past."[9] We agree.

We are aware of no evidence that the marketplace has failed with respect to the amount of commercialization on broadcast television or that the public interest is somehow being shortchanged. In fact, the Commission has recently concluded that the format employed by most home shopping stations does not prevent those stations from operating in the public interest.[10] The Commission rejected the suggestion that

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[9] Id. at pp. 4-5. He also cautioned that "[a]ny evaluation of the constitutional 'worth' of speech that is based on the percentage of editorial content compared to advertising material is a very suspect proposition" from a First Amendment standpoint. Id. at note 20. The Commission also took account of First Amendment concerns and audience preferences when it declined to transform its guidelines into formal standards to eliminate "overcommercialization" in 1981: "[i]n the absence of significant numbers of public complaints on the subject and in light of recent Supreme Court pronouncements on the First Amendment and Advertising, we see no reason to revisit our commercial guidelines for television at this time." In the Matter of Adoption of Standards for the Elimination of Television Overcommercialization in the Public Interest, 49 Rad. Reg. 2d (P&F) 391 (1981) at paragraph 9.

[10] In the Matter of Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, Home Shopping Issues, MM Docket No. 93-8, 73 Rad. Reg. 2d (P&F) 355 (1993) (Home Shopping Stations (Mandatory Carriage)), paragraph 31: "We observe that we have never denied the license renewal application of any home shopping station, thus indicating that these stations have been able to meet the Commission's standards on public affairs programming responsive to issues confronting the local community, as well as standards on indecency and political or emergency broadcasting. Indeed, with regard to serving the needs and interests of children, as with all public interest

use of a home shopping format allows broadcasters to "evade" market forces. To the contrary, the Commission noted that these formats were a positive market response to consumer demand for more diverse programming of that type:

> [The] claim that the use of a home shopping format allows broadcasters to "evade" market forces is not supported by any data. Indeed, the record clearly demonstrates that market forces have revealed a desire among a significant number of television viewers for home shopping programming. We find no reason to believe that home shopping stations would survive in an increasingly competitive video marketplace if viewers were dissatisfied with their level of commercialization.[11]

Indeed, rather than "evade" market forces, the home shopping format provides healthy competition for other video market participants (including cable home shopping services) and introduces more diversity for the viewing audience. This innovative, interactive format could not have developed under the quantitative commercial guidelines that the Commission has abandoned.[12]

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considerations, home shopping stations must comply with the same rules that apply to other television broadcast stations."

[11] Home Shopping Stations (Mandatory Carriage), 73 Rad. Reg. 2d (P&F) 355 at paragraph 27.

[12] "A significant danger posed by our commercial guideline is that it may impede the ability of commercial television stations to present innovative and detailed commercials." Deregulation Order at paragraph 62.

In short, there is no persuasive reason to limit the amount of commercialization in programming directed to general audiences. Moreover, there is no basis for arguing that without regulation, market forces would fail to protect the public interest. Viewers have the ability to distinguish between commercial and program matter and can readily express their dissatisfaction with levels of commercialization on particular television stations by turning elsewhere -- to other broadcast stations or to cable or other video choices.

B. Effect on Competition.

The 1984 Commission characterized the likely interference with a freely competitive marketplace as a "significant danger" were it to maintain the pre-existing commercial guidelines. The same would be true were the guidelines to be reinstated today.

The Commission's Notice of Inquiry in this Docket comes at a time when broadcasting in general is being severely tested by new and growing competition. The recent OPP Paper underscores the effect of the profound changes in the video marketplace in the past fifteen years. As a result of technological advances, the number of media voices has increased enormously, introducing unprecedented competition for all market participants. American viewers now have available a myriad of choices, and they have been taking advantage of them. The consequence has been a fragmentation

of the viewing audience and, as a result, an erosion of the broad-based audience on which the network companies depend for their advertising revenue and hence their ability to offer diverse programming at no charge to the public.

There are two lessons to be learned from this phenomenon. First, to compete fully and effectively, network companies must remain free of artificially imposed commercial limits. Because they provide broadcast programming at no charge, network companies and local broadcasters must finance their programming virtually exclusively from the revenue generated by advertising. Such revenues can vary widely from year to year with the strength of the advertising marketplace, and more fundamentally, with the size of the audience that a particular broadcaster can attract. Yet, in attracting such revenue the network companies compete for audience and advertising directly against cable operators and other multichannel program providers which can finance their operations from a dual revenue stream (advertising revenue and cable subscription revenue).

Second, limits on commercialization are in no sense necessary to protect the public interest. To the contrary, viewers have clearly availed themselves of the option of watching programs on cable that do not depend in the same way upon advertising revenues. Imposing an artificial limit on the amount of commercial matter would do nothing but place

broadcasters at a serious disadvantage vis-a-vis their nonbroadcast competitors.

The point to be drawn from these lessons is that, as the Commission found in 1984, the marketplace effectively operates to prevent possible commercialization abuse. "The tyranny of the remote control" provides a complete and effective check against risk of overcommercialization. In this environment, the reintroduction of governmental regulation is not necessary; nor would it promote the public interest. To the contrary, broadcasters should remain free to establish those commercial practices and those levels of commercialization that best suit the competitive conditions in the various marketplaces in which they operate and that are most appropriate, both for their overall schedules and for specific programs or dayparts.[13] Constraints on their ability to do so could needlessly create obstacles to the maintenance or expansion of network programming.[14]

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[13] The Children's Television Act of 1990 and the Commission regulations implementing that legislation impose a limitation on the amount of commercial matter in programming designed for children twelve years old and younger.

[14] To cite just one example, one potentially attractive means for networks to induce clearance of new or existing programs would be to offer affiliates additional commercial minutes in such programs for their own local sale. Commercial restrictions might limit that option.

II. LIMITS ON COMMERCIAL MATTER ON BROADCAST STATIONS WOULD RAISE SUBSTANTIAL FIRST AMENDMENT CONCERNS.

Any consideration of restrictions on televised advertising must take account of the First Amendment protection for commercial speech articulated in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S 748 (1976) ("Virginia Pharmacy"). Virginia Pharmacy held advertising worthy of protection because it serves the interests, not only of the advertiser, but of the consumer and of society at large by conveying to consumers "information as to who is producing and selling what product, for what reason, and at what price" (425 U.S. at 765). The Supreme Court has recently strongly reaffirmed that First Amendment protection extends to "even a communication that does no more than propose a commercial transaction."[15]

Classification of an entire form of advertising (i.e., commercial matter in television broadcast programming) as inherently subject to abuse cannot be presumed under the applicable constitutional test. The basic rule is that nondeceptive advertising may be restricted only to advance a substantial governmental interest in a direct and material way by means no broader than reasonably necessary.[16] In the leading case of Central Hudson, the Supreme Court set forth

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[15] Edenfield v. Fane, 113 S. Ct. 1792, 21 Med. L. Rptr. 1321, 1324 (1993).

[16] Central Hudson Gas & Electric v. Public Service Commission, 447 U.S. 557 (1980).

the rule:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Central Hudson, 447 U.S. at 566. The Court subsequently made clear that there must be a reasonable "fit" between the goal to be served and the means chosen to achieve that goal.[17] Although the means chosen need not be the least restrictive, they must be narrowly tailored to achieve the result.[18]

The Children's Television Act limitations on commercials in children's programs warrant no precedential weight in assessing the governmental interest in regulating commercialization in non-children's programming. In the case of children's programming, the target audience is presumed to be harmed by excessive commercialization because of its youth, inexperience and hence special vulnerability to commercial messages. Moreover, the legislative history of the Act reflects the judgment that the marketplace cannot be relied upon to control the supposed harm in that case, since "young

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[17] Cincinnati v. Discovery Network Inc., 113 S. Ct. 1505, 21 Med. L. Rptr. 1161 (1993), ("Discovery Network") citing Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989).

[18] Discovery Network, 21 Med. L. Rptr. at 1164, note 13.

children do not have the cognitive ability to distinguish commercial matter from program matter [and therefore] cannot react negatively to overcommercialization of programming" by turning off the program.[19] This is obviously not the case with respect to general interest programming. Adults know what a commercial is and have the ability to turn away from programs for any reason, including too much commercial matter.

We recognize that at this Notice of Inquiry stage, the Commission is neither proposing nor attempting to justify a return to commercial time limitations. We would merely point out that in today's diverse marketplace viewer preference can operate as effectively to eliminate overcommercialization as it does to eliminate unpopular programs. Under modern circumstances, referred to by Chairman Quello as the "tyranny of the remote control," it is hard to imagine a government interest that would rise to the level of substantiality constitutionally sufficient to justify regulation.

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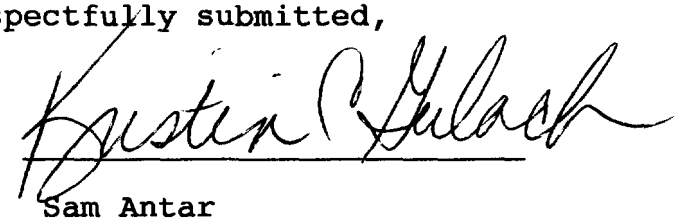
[19] Children's Television Act of 1989, Senate Committee on Commerce, Science and Transportation, Senate Report No. 227, 101st Cong., 1st Sess. 9 (1989). We do not necessarily agree that commercial limits for children's programming are appropriate or constitutional.

Conclusion

For the foregoing reasons, Capital Cities/ABC urges the Commission not to establish limits on the amount of commercial matter broadcast by television stations.

Respectfully submitted,

By: 

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